Supreme Court, U.S.
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No. 95-865 (3)

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF WINSTAR CORPORATION AND THE STATESMAN GROUP, INC., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal government can deliberately repudiate, without liability, specifically negotiated, unambiguous, and express contractual commitments for which it has received valuable consideration simply by changing the law.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, respondents are Statesman Savings Holding Corp., American Life and Casualty Insurance Company (ALCIC), the Statesman Group, Inc., and Winstar Corporation.

Statesman Savings Holding Corp. is held by ALCIC and the Statesman Group, Inc. (now known as American Life Group, Inc.) and has no non-wholly owned subsidiaries.

ALCIC owns 98% of Vulcan Life Insurance Co. ALCIC's parent is the American Life Holding Company, which is wholly owned by the American Life Group, Inc.

The Statesman Group, Inc. (now, American Life Group, Inc.) is held by Conseco Capital Partners II, L.P., CIHC, Inc., and Bankers Life Holding Corp. CIHC, Inc., which owns nearly 90% of Bankers Life Holding Corp., is wholly owned by Conseco, Inc. Conseco, Inc. is also the managing general partner of Conseco Capital Partners II, L.P. The Statesman Group, Inc. has no non-wholly owned subsidiaries.

The Winstar Corporation has no parent or non-wholly owned subsidiaries.

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This case is actually three separate cases, consolidated by the Court of Federal Claims for purposes of an interlocutory appeal of the court's order granting plaintiffs' (respondents here) motions for partial summary judgment as to liability. App. 151a.[1] This brief in opposition to the government's petition for writ of certiorari is filed on behalf of the respondents in two of the consolidated cases – Winstar Corporation ("Winstar") and The Statesman Group, Inc., and its affiliated entities (collectively "Statesman"). Respondent in the third consolidated case, Glendale Federal Bank, FSB, is represented by separate counsel and is filing its own brief in opposition.

STATEMENT OF THE CASE

In upholding the trial court's finding of contract liability against the government, a nine-judge majority of the *en banc* Federal Circuit concluded that "[t]here is nothing extraordinary about the contracts in these cases save for their subject matter and the potential liability to the government." App. 45a. Applying straightforward and venerable principles of contract law, the Federal Circuit concluded, as had the trial court, that in acquiring failed savings and loan institutions ("thrifts"), respondents had "negotiated contracts with the bank regulatory

[1] "App." refers to the appendix to the petition for a writ of certiorari. "Pet." refers to the petition itself. "C.A. App." refers to the appendix filed jointly by the parties in the Federal Circuit.

agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time." App. 30a. Winstar and Statesman fulfilled their obligations under their contracts with the government, but the government did not. Because the thrift regulators, acting pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464), and its implementing regulations, repudiated their agreements and largely eliminated the bargained-for supervisory goodwill and capital credits from the thrifts' regulatory capital, "Winstar and Statesman were immediately thrown into noncompliance with the new regulatory capital requirements and were seized by federal regulators within approximately six months." *Id.* The government's repudiation of its agreements with respondents was nothing more, nor less, than an old-fashioned breach of contract, and the only thing remarkable about this case are the arguments advanced by the government to avoid its liability for the harm it has caused to respondents.

In its effort to persuade this Court that these consolidated cases, despite their interlocutory nature, warrant this Court's immediate review, the government portrays the thrift regulators – the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("Bank Board") – as financially disinterested in the acquisitions, passively providing the necessary "regulatory approval of the Bank Board for the . . . acquisition," Pet. 7, and "permit[ting respondents] to use 'goodwill' to satisfy federal regulatory capital

requirements" until FIRREA finally curtailed such "shadowy" accounting "gimmicks." Pet. 4-5. One would scarcely conclude from a reading of the petition that the thrift regulators' commercial interests as the *insurer* of the deposits of the acquired thrifts were vitally at stake in these transactions; that the regulators aggressively solicited Winstar and Statesman to acquire the insolvent thrifts; that the use of regulatory capital "forbearances" such as supervisory goodwill to facilitate mergers and acquisitions of failed thrifts saved the *regulators*, not the acquirors, huge sums of money; that the regulators had no choice but to aggressively promote the use of supervisory goodwill and capital credits because they lacked the cash that would otherwise have been necessary to facilitate acquisitions of failed thrifts; and that the regulators' transactions with Winstar and Statesman saved the government tens of millions of dollars. Because the government's petition thus casts the transactions giving rise to this case in a false light, a somewhat extended counterstatement of the case is required.

1. The causes and extent of the financial crisis in the thrift industry in the 1980s is amply described by the court of appeals in both the panel majority opinion (App. 57a-61a) and the *en banc* majority opinion (App. 4a-7a). It suffices here to say that by 1983, when Winstar acquired an insolvent thrift from the FSLIC, hundreds of savings and loan institutions had failed and the FSLIC was *in extremis*. Historically, the FSLIC and the Bank Board had "resolved" failed thrifts either by liquidation or by offering enough cash or other tangible financial assistance to induce a healthy institution or investor to acquire the failed thrift. The cost to the FSLIC insurance fund of

facilitating the acquisition of a failed thrift usually ran about 70 percent of the cost of liquidating the thrift.[2] Because of the unprecedented number of thrift failures in the early 1980s, "the FSLIC faced deposit insurance liabilities that threatened to exhaust its insurance fund," App. 5a, and it was forced to offer favorable regulatory capital forbearances instead of cash and other tangible financial assistance to induce healthy institutions and private investors to acquire insolvent thrifts. The primary regulatory capital forbearance offered by the regulators was "supervisory goodwill," which was created under the "purchase method" of accounting for a thrift acquisition, and was measured as the amount by which the cost of the acquired thrift (which included any liabilities assumed by the acquirer) exceeded the fair market value of the acquired assets. As the court of appeals explained:

> The Bank Board and the FSLIC allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and *without requiring large amounts of monetary assistance from the government.*

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[2] *Housing and Urban Recovery Act of 1982: Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking Finance, and Urban Affairs*, 97th Cong., 2d Sess. 1490, 1501 (March 24, 1982) (statement of Richard T. Pratt, Chairman, Bank Board) ("Pratt Testimony").

App. 6a (emphasis added). The FSLIC and the Bank Board also permitted some acquirers to count all or a portion of the cash contributed by the FSLIC to the deal as a direct and sometimes *permanent* credit to the acquired thrift's regulatory capital. This regulatory forbearance was called, not surprisingly, a "capital credit."

The FSLIC and the Bank Board thus used supervisory goodwill and capital credits, as the Chairman of the Bank Board testified in 1982, "as a means of conserving FSLIC's insurance fund." Pratt Testimony at 1502. And it worked. By offering regulatory capital forbearances, the FSLIC and the Bank Board "stimulated many acquisitions that would otherwise not have taken place" absent much greater cash contributions by the FSLIC. App. 7a. As a result, the average cost to the FSLIC of facilitating the acquisition of an insolvent thrift was reduced to less than 20 percent of the estimated liquidation cost. Pratt Testimony at 1501.

The point is simply this: offering Statesman and Winstar favorable regulatory capital forbearances to induce their acquisitions of failed thrifts was *the government's idea*. Far from the disinterested regulators portrayed in the government's petition, the FSLIC's commercial and financial interests as a deposit insurer were vitally at stake in these transactions, and it needed to sell the failed thrifts to Statesman and Winstar far more than Statesman and Winstar needed to buy them. The FSLIC and the Bank Board offered supervisory goodwill and capital credits as substitutes for the cash that they did not have, and they aggressively encouraged Statesman and Winstar to accept these regulatory capital forbearances as *consideration*, the *quid pro quo* for assuming

liabilities that far exceeded the assets acquired. And the Statesman and Winstar transactions saved the insurance fund, by the FSLIC's own reckoning, almost $60 million over the cost of liquidating the insolvent institutions. App. 11a-12a.

2. a. After "year-long negotiations between Statesman and FHLBB and FSLIC," App. 109a, Statesman acquired four deeply insolvent thrifts in March 1988. Statesman agreed to invest $21 million in the merged institutions, and the government agreed to make a $60 million capital infusion. App. 110a-111a. Even after these capital infusions had been made, however, the merged institution acquired by Statesman was still insolvent, with a *negative* tangible net worth of almost $9 million. In other words, Statesman invested $21 million in a thrift that not only failed to satisfy, on a tangible capital basis, the government's regulatory capital standards, but was deeply insolvent and thus subject to seizure by the thrift regulators on the very day that they delivered it to its new owners. App. 64a.

Statesman agreed to this seemingly foolish acquisition because it bargained for and received from the government express contractual promises (1) that the supervisory goodwill created by the transaction – a figure ultimately calculated to be $25.8 million – could be reported by the thrift as regulatory capital and amortized over a period of 25 years, and (2) that $26 million of the FSLIC's cash contribution could be recorded as a direct and permanent capital credit to the thrifts' regulatory capital. App. 10a. In return for these regulatory capital forbearances, the FSLIC and the Bank Board received what they believed to be a "permanent" disposition of

four of their most serious problem thrifts at a cost to the insurance fund far lower – $50 million lower – than the cost of liquidation.

Statesman took the government at its word, and fully performed its end of the bargain. Indeed, under Statesman's management the thrift's tangible net worth increased from negative $9 million to just under negative $3 million. Yet, on July 5, 1990, the thrift regulators declared Statesman's thrift to be "in an unsafe and unsound condition to transact business," C.A. App. 1071, despite the plain fact that the thrift was by then far safer and sounder than it was a scant 20 months earlier, when the government turned it over to Statesman. The government seized the much-improved thrift along with Statesman's $21 million.

The government changed its mind about the soundness of the thrift's financial condition because it changed its mind about allowing the thrift to report its bargained-for supervisory goodwill and capital credit as regulatory capital. Pursuant to FIRREA, the Bank Board's successor agency, the Office of Thrift Supervision ("OTS"), promulgated new minimum capital standards that largely eliminated the thrift's ability to report its goodwill and capital credit as regulatory capital – the central *quid pro quo* for Statesman's agreement to acquire the insolvent thrifts on the financial terms negotiated by the parties. If the government had honored its contractual obligations to Statesman, the thrift would have satisfied – with millions of dollars to spare – all three of the new minimum regulatory capital standards established by FIRREA. App.

113a-114a. Thus, as the Court of Federal of Claims concluded, "but for the enactment of FIRREA, Statesman would be operating today." App. 114a.

b. In late 1983 the FSLIC and the Bank Board began soliciting bids for the acquisition of Windom Federal Savings & Loan Association, an insolvent thrift institution whose failure was imminent and whose liquidation would cost the FSLIC an estimated $12 million. App. 184a. Winstar, which was organized by private investors for the sole purpose of acquiring the thrift, submitted the winning bid, which saved the FSLIC more than half the estimated cost of liquidating the thrift. App. 185a. Pursuant to the parties' acquisition agreement, Winstar invested approximately $2.8 million in the thrift, while the FSLIC contributed approximately $5.6 million. App. 194a. Even with these capital contributions, the acquired thrift's tangible net worth was approximately *negative* $6.7 million. Accordingly, the "linchpin of the parties' agreement," as the trial court noted, was the government's express promise that the goodwill resulting from the transaction – slightly over $10.6 million – could be reported as regulatory capital: "[T]he promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction." App. 154a.

Winstar's thrift failed to satisfy FIRREA's new minimum capital standards. In May of 1990, OTS placed the thrift in receivership. App. 14a.

3. Statesman and Winstar filed suit against the United States in the Court of Federal Claims, seeking monetary relief on contractual and constitutional theories. The trial court granted, in separate opinions, both Statesman's and Winstar's motions for summary judgment as to liability. App. 106a-152a (*Statesman*); App. 153a-182a (*Winstar*). The Court held that the government had entered into an express contract with Statesman, and an implied-in-fact contract with Winstar, regarding the regulatory capital treatment of supervisory goodwill (and in *Statesman*, the capital credit), and that the government had breached its contractual obligations. In light of its finding of liability on respondents' contract claims, the court did not reach respondents' claims under the Takings Clause and the Due Process Clause of the Fifth Amendment. The court rejected the government's arguments that the "sovereign acts" doctrine and the "unmistakability" doctrine shielded the government from monetary liability. The court consolidated the *Statesman* and *Winstar* cases with the similar *Glendale* case and certified its decisions for interlocutory appeal to the Federal Circuit.

4. A divided panel of the Federal Circuit reversed the trial court's liability rulings in favor of Statesman and Winstar. App. 53a-103a. The panel decision was vacated, however, when the full court granted respondents' petitions for rehearing *en banc*. App. 105a. The *en banc* Federal Circuit affirmed the trial court's contract liability rulings by a 9-to-2 vote. App. 1a-52a. The court of appeals painstakingly reviewed *de novo* the contract documents governing the transactions and concluded, as the trial court had, that the regulatory capital treatment of supervisory

goodwill (and of Statesman's capital credit) was a specifically bargained for and agreed upon term of the contracts between the parties.

With respect to the Statesman transaction, the court of appeals first noted that the government had conceded that the "Assistance Agreement" executed by the parties contained an express term allowing Statesman to report its $26 million capital credit as regulatory capital. The court of appeals found the government's promise concerning supervisory goodwill specifically described in the resolution issued by the Bank Board in connection with the transaction. The Bank Board's resolution, which also reiterated the government's promise concerning Statesman's $26 million capital credit, expressly provided that in "report[ing] to the Bank Board and the FSLIC, . . . [t]he value of any unidentifiable intangible assets [*i.e.*, goodwill] resulting from accounting for the Acquisition . . . in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method." App. 25a-26a. The Federal Circuit rejected the government's argument that the Bank Board's resolution did not constitute a contract document, noting that the Assistance Agreement contained an integration clause that expressly incorporated contemporaneous resolutions of the Bank Board. App. 25a. Accordingly, the Federal Circuit concluded that the government was contractually bound to permit Statesman to report its supervisory goodwill and capital credit as regulatory capital on the specified terms.

With respect to the Winstar transaction, the court of appeals found that the government had expressly promised to treat Winstar's supervisory goodwill as regulatory

capital, and thus the court did not need to reach the question whether such a promise could be implied-in-fact. Although the Assistance Agreement did not contain a specific provision relating to supervisory goodwill, it did contain an integration clause specifically incorporating into the parties' contract any "resolutions or letters issued contemporaneously" by the Bank Board. A "forbearance" letter issued by the Bank Board in connection with the transaction specifically "confirm[ed] the understanding" of the parties that

> [f]or purposes of reporting to the Board, the value of any intangible assets resulting from the accounting for the merger in accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35 years by the straight-line method.

App. 27a-28a.

Having found express contractual commitments by the government concerning the regulatory capital treatment of respondents' supervisory goodwill and capital credit, the Federal Circuit readily and correctly concluded that the government's repudiation of those commitments constituted a breach of its contractual obligations.[3]

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[3] The court of appeals also rejected the government's claim that its contractual commitments concerning regulatory capital were negated under the so-called "unlawful action" clause of the parties' agreement. The clause provides: "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." App. 23a. The Federal Circuit, like the trial court (App. 125a-129a), interpreted this clause as protecting against any inadvertent violation of law existing when the contract was entered, rather than supplying "an escape

The Federal Circuit turned next to the government's sweeping claim that respondents' contracts failed to satisfy the requirements of the "unmistakability doctrine." Relying primarily on this Court's decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), the government argued that because respondents' contracts did not contain an express provision guaranteeing that the government would continue to honor the regulatory capital forbearances notwithstanding a legislative change such as FIRREA, the contracts should not be construed as unmistakably waiving Congress' sovereign power to legislate. Quoting liberally from the trial court's analysis of the unmistakability doctrine, the Federal Circuit reasoned that the government's argument was based upon the false premise that respondents sought to bind "Congress not to change its regulations." App. 37a. Respondents, however, were not seeking to "enjoin[ ] the thrift regulators from applying the FIRREA requirements to the thrifts." App. 37a. Rather, they sought only monetary relief for the harm that they suffered when FIRREA's requirements *were applied* to them. Thus, the court of appeals concluded that upholding the government's contract liability to respondents would not threaten Congress' sovereign power to legislate: "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the government's prior

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hatch that allows the federal government to avoid performance of its contractual obligations without penalty by passing a law prohibiting its own performance." App. 23a-24a.

contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach." App. 38a.

With specific reference to this Court's decision in *POSSE*, the Federal Circuit agreed with the trial court that "the unmistakability doctrine . . . controls how contractual rights with the government are *created*, *i.e.*, whether the government has agreed in unmistakable terms to be contractually bound." App. 35a-36a. Because Winstar's and Statesman's contracts granted them, "in the clearest possible terms, the right to certain types of regulatory capital treatment," the requirements of the unmistakability doctrine were satisfied. *Id.*

Finally, the Federal Circuit rejected the government's defense under the "sovereign acts doctrine," which excuses the government from contract liability when its performance is precluded by "a public and general sovereign act." App. 39a. FIRREA's provisions concerning supervisory goodwill did not qualify as "public and general" sovereign acts because they specifically targeted respondents' agreements and similar contracts. FIRREA's provisions restricting the regulatory capital treatment of supervisory goodwill, while no doubt enacted for the public good, "specifically abrogate[d] agreements the government had made at an earlier time when it had suggested and approved the use of such 'gimmicks' to avoid bailing out failing thrifts." App. 43a. Because the government had "plainly sought to render its own performance impossible," the sovereign acts doctrine did not insulate it from damages liability. App. 45a.

Judge Nies and Judge Lourie filed separate dissents. Judge Nies continued to adhere to the views expressed in her majority opinion for the panel. (The other member of the panel majority, Judge Rich, changed his mind on reconsideration and joined the *en banc* majority.) She believed that the majority had erred in failing to distinguish between the "government" and Congress in concluding that the enactment of FIRREA had breached respondents' contracts. App. 47a. Judge Lourie concluded that the sovereign acts doctrine precluded respondents' recovery for breach of contract because FIRREA was "broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved." App. 51a.

REASONS FOR DENYING THE WRIT

The government's complicated and sophisticated arguments cannot obscure the simple and straightforward nature of respondents' claim. Winstar and Statesman were induced by the government's thrift regulators to acquire at great expense deeply insolvent thrifts on the basis of the government's contractual commitment to accord the acquired institutions certain specifically negotiated and clearly expressed regulatory capital forbearances. Respondents fully performed their contractual obligations, but the government did not, causing respondents substantial damage. If it is true, as it always has been, that "in the performance of its voluntary engagements with its citizens [the government] should conform to the same standard of honorable conduct as it exacts of them," *Heil v. United States*, 273 F. 729, 731 (S.D.N.Y. 1921)

(Hand, J.), then the courts below did not err in holding the government liable in damages for its breach. Nothing in this Court's teachings on the unmistakability and sovereign acts doctrines suggests otherwise. This case thus presents no legal issue warranting this Court's review, particularly at this interlocutory stage of the proceedings.

1. a. The government asserts that the Federal Circuit "expressly declined to apply the unmistakability doctrine in this case." Pet. 15. If the court of appeals had applied the unmistakability doctrine, it would have concluded, according to the government, that the specifically negotiated, unambiguous, and express contractual promises concerning respondents' regulatory capital forbearances were not sufficiently unmistakable to bind the government. They were not unmistakable, the government says, because the parties' contracts did not contain language "bargain[ing] away Congress's right to change the law"; that is, the contracts did not "include a promise that the federal government would continue to permit supervisory goodwill and capital credits to be counted as capital for purposes of federal thrift capitalization requirements . . . regardless of any change in the law." Pet. 14, 19.[4]

[4] In its briefing to the Federal Circuit, the government offered more specific insight into its version of the unmistakability doctrine, asserting that it could not be held liable to respondents in the absence of "an unambiguous contract provision stating that [the thrift agency] was guaranteeing a specified form of regulatory treatment for a single thrift, and that the contract would override any attempt by Congress to legislate differently for the thrift industry." Replacement Reply Brief of Defendant-Appellant United States at 9.

One need only state the government's understanding of the unmistakability doctrine to know that it is wrong. Indeed, if the government's version of the unmistakability doctrine is correct, then the many cases in which this Court has enforced contracts against the United States despite subsequent changes in the law must be wrong. For example, in *Perry v. United States*, 294 U.S. 330 (1935), this Court held that a government bond promising the payment of principle and interest in gold was a binding contractual obligation that could not be abrogated by subsequent legislation. Similarly, in *Lynch v. United States*, 292 U.S. 571 (1934), the Court held that war risk insurance policies issued pursuant to statute were contracts that could not be abrogated by subsequent statutes without compensating the beneficiary. In neither case did the government contract at issue contain even a reference, unmistakable or otherwise, to Congress or its sovereign powers, let alone a provision "commit[ting] Congress not to modify the governing statutes." Pet. 21. In both *Perry* and *Lynch* the Court made clear that the government is bound by its express contractual undertakings no less than an individual would be. *See Perry*, 294 U.S. at 352 ("When the United States, with constitutional authority, makes contracts, it . . . incurs responsibilities similar to those of individuals who are parties to such instruments."); *Lynch*, 292 U.S. at 579 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."). *See also Sinking-Fund Cases*, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals."); *United States v. Klein*, 80 U.S. (1 Wall.) 128, 144 (1871) ("It

is as much the duty of the government as individuals to fulfill its obligations.")

In truth, the government's notion of contract unmistakability misappropriates the nomenclature of a venerable and sensible rule of construction – that contract rights against the government cannot be implied or presumed, but must be "expressed in terms too plain to be mistaken," *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1862) – and attaches it to an extraordinary claim of governmental immunity from liability for any contract breach occasioned by an act of Congress. The origins of the doctrine can be traced back to the early 1800s. In the leading case, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830), a bank claimed that its charter from the state created a contract right precluding the state from taxing it. Because the charter did not contain "a promise, either express or implied, not to tax the bank," *id.* at 560, the Court held that such a contractual promise "ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." *Id.* at 561. Nowhere did the Court suggest that anything more "unmistakable" than an express promise not to tax would be required to bind the government. Indeed, in *Jefferson Branch Bank v. Skelly, supra*, this Court held that a bank's charter did create a contract right exempting the bank from taxation imposed by subsequent statute. The charter provision at issue provided that a certain percentage of the bank's profits were to go to the state "in lieu of all taxes."[5] Certainly this language – though unmistakable in

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[5] *Piqua Branch of the State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369, 378 (1854). The Court's opinion in *Jefferson Branch*

the common sense of the term – does not satisfy the unmistakability rule advanced by the government. Yet this Court construed the charter provision to have contractually bound the state "in terms too plain to be mistaken." *Jefferson Branch Bank*, 66 U.S. (1 Black) at 446.

These cases are the direct ancestors of the three cases cited by the government in support of its version of the unmistakability doctrine – *POSSE*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). *Merrion* involved leases granted by the Apache Tribe for the extraction of oil and gas deposits on reservation land. The Tribe later imposed a severance tax on oil and gas production covered by the leases, and the lessees sought to enjoin imposition of the tax on the ground that their leases exempted them from such taxes. The leases, however, were silent on the question of severance taxes. As the Court concluded:

> We could find a waiver of the Tribe's taxing power only if we *inferred it from silence* in the leases. To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head. . . .

455 U.S. at 148 (emphasis added).

Quoting the above passage from *Merrion*, the Court in *POSSE* reiterated that a contractual waiver of the government's right to exercise sovereign powers cannot be

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Bank does not set out the specific charter provision at issue, but it cites to the *Piqua Branch* decision, which does.

inferred from contractual silence on the issue. *POSSE* involved a purported contract between the Department of Health and Human Services ("HHS") and the State of California governing the State's participation in the social security system. The agreement was expressly made subject to the provisions of the Social Security Act, which at the time the agreement was entered permitted states to withdraw from participation in the program. A subsequent amendment to the Act prohibited states from withdrawing from the system. This Court held that neither the Act nor the State's contract obliged the government to permit the State's withdrawal. Because Congress had expressly reserved in the statute the "right to alter, amend, or repeal" any of its provisions, 477 U.S. at 52, the Act itself obviously "created no contractual rights," and because the contract conformed to the Act, it too created no contractual right to withdraw. *Id. POSSE* thus stands for the common sense rule of construction that neither the government nor anyone else is contractually bound in the face of statements that expressly negate any intention to be bound. *POSSE* expressly reaffirmed, however, that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Id.*

Finally, in *United States v. Cherokee Nation*, 480 U.S. 700 (1987), the Tribe claimed that a treaty granting it title to a river bed also conveyed the federal government's navigational servitude, although the treaty was silent on the point. Citing *POSSE*, this Court rejected the claim, stating that such a waiver of "sovereign authority will not

be implied, but instead must be 'surrendered in unmistakable terms.' " *Id.* at 707 (quoting *POSSE*, 477 U.S. at 52).

The consistent teaching of these cases is that an "unmistakable" promise is simply a clearly expressed promise – that is, the opposite of an implied or presumed promise. None of the cases even distantly suggests that in order to bind the government to a clearly expressed promise, it must be coupled with a further promise that Congress will not enact contrary legislation. Thus, while it is certainly true that the courts below expressly declined in this case to apply the government's extreme version of the unmistakability doctrine, they faithfully applied this Court's version of the doctrine.[6]

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[6] Nor does the Federal Circuit's decision in this case present a conflict in the circuits in analogous cases. In its attempt to create the appearance of such a conflict, the government relies on the Fourth Circuit's decision in *Charter Fed. Sav. Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993), the Eleventh Circuit's decision in *Guaranty Fin. Serv., Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991), and the Third Circuit's decision in *Carteret Sav. Bank v. OTS*, 963 F.2d 567 (3d Cir. 1992). Pet. 16-17. In contrast to the Government's portrayal of those cases, however, both *Guaranty* and *Charter* represent straightforward applications of the principles discussed in *POSSE*. In *Guaranty* the government expressly reserved the right to change applicable regulations and apply them to the thrift. 928 F.2d at 999. And the Fourth Circuit in *Charter* expressly distinguished that case from *Winstar* and *Statesman*, noting that *Charter* did not involve a written contract of any kind between the plaintiffs and the government. 976 F.2d at 211 n.12. In *Carteret*, the Third Circuit specifically declined to reach the issue of contract construction. *See* 963 F.2d at 572-73 ("we need not reach the issue whether Carteret had any contract with the government regarding the treatment of goodwill").

b. It is true, as the government states, that nothing in FIRREA "grant[s] FSLIC or the Bank Board the authority to commit Congress not to modify the governing statutes." Pet. 21. It follows, the government says, that even if the thrift regulators had expressly promised to honor respondents' regulatory capital forbearances despite congressional enactment of contrary legislation, "[i]t is doubtful whether any such commitment by regulators . . . could bind the legislative branch of the federal government." Pet. 19. As we have demonstrated above, however, the unmistakability doctrine, properly understood, requires nothing more to bind the government than a clearly expressed contractual promise, not a further commitment that the promise will be honored despite enactment of contrary legislation. Thus, the fact that FIRREA does not contain a provision delegating to the thrift regulators' authority to make such a commitment is quite beside the point.

It is important to note in this regard that respondents have never argued, and the courts below did not hold, that respondents' contracts either bound Congress not to enact contrary regulatory capital requirements or prohibited it from applying any such requirements to respondents. The government nonetheless argues that it cannot

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That the *POSSE* doctrine precluded relief in cases in which there was no contract to begin with or in which the contract included an express reservation of authority to alter the terms of performance does not mean that it precludes relief here, where the parties' contracts clearly express the government's promise with respect to the regulatory capital forbearances at issue and which contain no similar language of reservation.

be contractually bound to accord a private party particular regulatory treatment, for subsequent legislatures and regulators must be free "to take actions that are in the public interest." Pet. 20, citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). Even taking the government's point at face value, however, it is relevant only to the question of what *remedies* are available for the government's breach of a contractual promise. The point does not go to the distinct *liability* questions of whether a contractual promise exists and, if so, whether it has been breached – the only issues presented in these cases. The government's need for regulatory flexibility would be satisfied by a rule holding that a private contractor is not entitled, as a remedial matter, to specific performance of a government promise concerning its regulatory discretion. But the government's need for regulatory flexibility provides no support for a rule of contract "interpretation" denying that a binding contractual promise was made in the first place. In other words, a determination that respondents are not entitled to injunctive relief against FIRREA's restrictions on regulatory capital is quite different from a determination that the government made no regulatory capital promises to respondents in the first place.[7] Under the government's

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[7] The D.C. Circuit made the same distinction in its two *Transohio* decisions. Specifically, although the first *Transohio* decision had adopted the United States' erroneous view of contract "interpretation" in a case seeking injunctive relief, the second *Transohio* decision determined that that rule would be inapplicable in a Tucker Act action for damages: "The *Transohio* opinion, including the statement that 'Transohio cannot prevail on its takings claim on the merits,' *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992), was solely concerned

theory, the regulators themselves could have reneged on their regulatory capital promises – and seized the thrifts – the day after Statesman and Winstar contributed over $23 million to the ailing institutions, because the parties had exchanged no genuinely binding contractual promises. The Federal Circuit aptly answered the government's point: "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where the legislation breached the government's contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach." App. 38a.

In any event, there is no doubt that the thrift regulators had ample statutory authority to enter into the contracts at issue here. As the court of appeals noted, the FSLIC has always had express statutory power "[t]o make contracts." App. 39a (quoting 12 U.S.C. § 1725(c)(3)). That nothing more is required is a central premise of the Tucker Act, whose purpose, according to Judge Learned Hand, was "to assume liability for the acts of such of [the government's] agents as had the power in the discharge of their duties to assume or refuse engagements on the faith of which other citizens should rely." *Heil*, 273 F. at 731.

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with *Appellants' ability to obtain injunctive relief*, as is evident from the opinion's repeated explanations that Transohio 'did not receive from the banking regulators a right that *defeats Congress' power to change the law on goodwill accounting.*' *Id.* at 613; *see id.* at 601, 624. That analysis has no bearing one way or the other on the *merits of Appellants' claim for compensation* in the Federal Court of Claims." *Transcapital Financial Corporation v. Director, OTS*, 44 F.3d 1023, 1025 (D.C. Cir. 1995) (emphasis added).

c. The government concedes in its petition, as it did in the courts below, that Statesman's contract with the government expressly permitted it to report its $26 million capital credit as regulatory capital. Pet. 10, 17-18. With respect to supervisory goodwill, however, the government claims that respondents' contracts were silent. Pet. 18-19. The government does not attempt to explain this inexplicable assertion. As previously discussed, the Federal Circuit, quoting the trial court, concluded that Winstar's and Statesman's contracts provided for regulatory capital treatment of supervisory goodwill "in the clearest possible terms." App. 36a. The Assistance Agreements governing both transactions contained integration clauses that expressly incorporated contemporaneous resolutions and forbearance letters of the Bank Board. App. 25a, 26a. The resolution pertaining to the Statesman transaction expressly provided that in Statesman's "report[s] to the Bank Board and the FSLIC, . . . any unidentifiable intangible assets resulting from accounting for the Acquisition . . . in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method." App. 25a-26a. Similarly, the Bank Board's forbearance letter in the Winstar transaction contained a virtually identical provision, although it called for an amortization of up to 35 years. *See* App. 28a.

Quite apart from the specific clauses expressly integrating Bank Board resolutions and forbearance letters into the parties' agreement, the Assistance Agreements governing the Winstar and Statesman transactions also included a specific "Accounting Principles" provision, which provided that the accounting for the transaction

would be governed by "any resolution or action of the Bank Board approving or relating to the Acquisition." App. 83a n.13; C.A. App. 849 (Statesman); C.A. App. 84 (Winstar). The "Accounting Principles" provision of the Assistance Agreements also specifically addressed the issue of future regulatory changes, squarely providing that the parties' agreement governed over any conflicting present or *future* "regulations of the Bank Board or the [FSLIC]": "If there is conflict between such regulations and the Bank Board's resolution or action relating to the Acquisition, . . . the Bank Board's resolution or action shall govern. For purposes of this section, the . . . governing regulations shall be those in effect on the Effective Date, *as subsequently changed, amended, clarified or interpreted* by the Bank Board. . . . " *Id.* (emphasis added). As Circuit Judge Newman noted below: "[T]he 'Accounting Principles' clauses in the Winstar and the Statesman agreements reflect the parties' recognition that the accounting principles might in the future be 'subject to clarification, interpretation or amendment,' and provide that '[i]f there is a conflict between such regulations and the Bank Board's resolution or action . . . , the resolution or action shall govern.' " App. 101a. Judge Newman interpreted this provision, correctly, as reflecting the government's express agreement "that in the event of regulatory change, the negotiated forbearances and accounting procedures would govern." App. 102a. Thus, Statesman's and Winstar's contracts in this case satisfy even the government's version of the unmistakability doctrine.

d. In sum, both the Federal Circuit and the Court of Federal Claims, which are especially entrusted with

issues of government contract interpretation and enforcement, concluded from all the evidence that Statesman and Winstar specifically bargained for and received an express government promise to accord regulatory capital treatment to supervisory goodwill and capital credit for the specified periods. This fact-bound issue plainly does not warrant further review by this Court.

2. a. The Federal Circuit and the Court of Federal Claims are exceedingly familiar with the sovereign acts doctrine, and their determination that the doctrine is inapplicable to this case is plainly correct. The central premise of the doctrine is that the federal government, as a contracting party, is entitled to be treated as if it were a private contracting party – no better, no worse. The doctrine excuses the government from contract liability when its performance is "incidentally" impaired by an *unrelated* "public and general sovereign act," such as an embargo. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). As this Court stated in *Horowitz*, "in this court the United States appears simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court." *Id.* (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384-85 (1865)). It is clear, therefore, that the sovereign acts doctrine does not immunize the government, any more than it would a private contractor, from liability for nonperformance of an *express contractual promise*. "The doctrine of 'public in general' 'sovereign acts,' laid down in *Horowitz* . . . does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963). *See also Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992).

Here, the government, in return for valuable consideration, expressly agreed that it would accord regulatory capital treatment to respondents' supervisory goodwill and capital credit for the specified periods of time. This promise was a life and death term of the transaction, as both parties fully understood. The government thus assumed the risk that some future sovereign act might impair or prevent its performance of its bargained-for promise.

b. The government disputes the Federal Circuit's conclusion that the relevant provisions of FIRREA were not "public and general" because Congress had "targeted thrifts that had undergone supervisory mergers" and had "plainly sought to render [the government's] own performance impossible." App. 45a. As the Federal Circuit stressed, "the very purpose" of the pertinent provisions of FIRREA "was to take away plaintiffs' rights to use supervisory goodwill because the Congress felt its use was no longer good policy." App. 41a. Noting that FIRREA granted respondents a brief transition period during which they were permitted to use a declining fraction of their bargained-for supervisory goodwill toward satisfying two of FIRREA's three new regulatory capital standards, the government asserts that FIRREA actually "placed respondents in a *better* position than other thrifts" with goodwill on their books. Pet. 24. Because these "transition rules . . . granted respondents a partial exception from more generally applicable restrictions," the government contends that the restrictions themselves were "public and general acts" within the meaning of the sovereign acts doctrine. Pet. 24.

First, this case is not about how much of respondents' bargained-for supervisory goodwill FIRREA permitted respondents to book as regulatory capital; it is about how much FIRREA *excluded* from respondents' regulatory capital. For Winstar and Statesman there was no transition period; their thrifts were seized within a few months of the date on which FIRREA's restrictions on supervisory goodwill became effective. The government will have a hard time convincing Statesman and Winstar that FIRREA placed them in a *better* position than other thrifts. Second, the government's argument is, in any event, a *non sequitur*. The transitional nature of FIRREA's provisions restricting the regulatory capital treatment of supervisory goodwill in no way negates the undeniable fact that the restrictions were *targeted* at *supervisory* goodwill, whose very existence, as Congress well knew, was attributable to acquisition agreements with the government. See App. 43a - 44a.

c. The sovereign acts doctrine is inapplicable to this case for another reason. The purpose of the doctrine, as discussed, is to place the government as contractor in the same shoes as a private contractor. But the contractual promises at issue here – to accord specified regulatory capital treatment to respondents' supervisory goodwill and capital credit – clearly could not have been made by a private party. Only the government could have made such a contractual promise, and only the government could have breached it. Surely the sovereign acts doctrine does not permit the government to escape damages liability for rendering impossible (by changing the law) its own performance of a contractual promise that only it could have made. Excusing a deliberate breach of such a

governmental promise would contradict rather than serve the purpose of the sovereign acts doctrine.

d. Finally, the government does not come to grips with the unconscionably unfair consequences of applying the sovereign acts doctrine in this case. The government, as a direct result of its repudiation of its contractual obligations, seized Statesman's and Winstar's thrifts, along with the substantial cash capital infusions ($21 million and $2.8 million, respectively) that they had made in the thrifts in direct reliance on the government's promises. The government would invoke the sovereign acts doctrine not only to excuse its breach, but also to retain Statesman's and Winstar's money as well. No sovereign acts case, of course, supports such a result.

3. Finally, even if this case presented a certworthy issue, which it does not, review at this interlocutory stage of the proceedings would be premature. *See, e.g., American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). *See also Virginia Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (opinion of Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). *See generally* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.18 (7th ed. 1993). The government argues that this Court's immediate review is nonetheless warranted because the damages trials in this case and in similar cases pending in the Court of Federal Claims will be "extremely complicated, expensive, and time-consuming . . . because the parties have very different views on this issue and the circumstances of each thrift vary greatly." Pet. 25.

It is the rare case indeed in which the parties do not "differ" with respect to the remedy that is to be awarded. And if avoiding the time and expense of remedial proceedings is sufficient reason to justify this Court's review of an interlocutory order, few interlocutory orders would fail to qualify. The government has thus offered no good reason for this court to deviate from its normal practice of reviewing only final decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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